

**MAY 27 2003**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON  
U.S. COURT OF APPEALS**

YOUNG MEE CHO, an individual; SALLY  
YOUNGAE CHO, an individual; PETER  
CHO, an individual,

Plaintiffs - Appellees,

v.

THE REPUBLIC OF KOREA, a foreign  
state,

Defendant - Appellant.

No. 02-55899

D.C. No. CV-01-05231-CAS

MEMORANDUM\*  
and ORDER

Appeal from the United States District Court  
for the Central District of California  
Christina A. Snyder, District Judge, Presiding

Argued and Submitted April 9, 2003  
Pasadena, California

Before: SCHROEDER, Chief Judge, and THOMPSON and GRABER, Circuit  
Judges.

Plaintiffs filed this action against the Republic of Korea, alleging  
conversion in violation of California law. Specifically, they claim that Defendant  
stole from them the assets and shares of Samho International Company, Inc.

---

\*/ This disposition is not appropriate for publication and may not be cited to or  
by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

("Samho"). Defendant moved to dismiss for lack of jurisdiction. The district court denied the motion, holding that the "commercial activity" exception to the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602-1611, forecloses the defense of sovereign immunity. Defendant brings a timely interlocutory appeal. On de novo review, Corzo v. Banco Cent. de Reserva del Peru, 243 F.3d 519, 522 (9th Cir. 2001), we affirm.

A. Motions Pertaining to the Record

\_\_\_\_\_Plaintiffs ask us to strike their state-court complaint from Defendant's excerpts of record. We grant the motion because this document was not part of the district court record.

Defendant asks us to take judicial notice of (1) an English translation of the Korean-language document that Plaintiffs attached to their federal complaint and (2) the state-court complaint referred to above. We grant this motion as well. The first is capable of ready determination and the second is a matter of public record. Fed. R. Evid. 201.

With respect to the second document, we are taking notice only of the fact that Plaintiffs filed the state-court complaint, but not of the truth of the facts alleged therein. See Lee v. City of Los Angeles, 250 F.3d 668, 690 (9th Cir. 2001). Plaintiffs' allegations were different in the state-court complaint because,

they allege, as a result of Defendant's concealment Plaintiffs had not yet discovered the evidence that is at the center of this case, namely, the document containing the forged signatures and falsely certified thumbprints. Accordingly, judicial estoppel does not apply. See Ryan v. Loui (In re Corey), 892 F.2d 829, 836 (9th Cir. 1989) (declining to apply judicial estoppel where a party's change of position was occasioned by its discovery that it had been deceived).

B. Commercial Nature of Defendant's Activity

Defendant is a foreign state. The issue is whether the allegations of Plaintiffs' complaint fall within the "commercial activity" exception to the FSIA, 28 U.S.C. § 1605(a).

Under that statute, we examine the nature of the activity in question rather than the activity's purpose. Joseph v. Office of Consulate Gen. of Nig., 830 F.2d 1018, 1023 (9th Cir. 1987); 28 U.S.C. § 1603(d). Even if performed with a public or regulatory aim in mind, acts by governmental entities are "commercial" if the role of the sovereign is one that could be played by a private actor. Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 614-15 (1992); Sun v. Taiwan, 201 F.3d 1105, 1107-08 (9th Cir. 2000). Said another way, an activity is commercial unless it is one that only a sovereign state could perform. MOL, Inc. v. People's

Republic of Bangl., 736 F.2d 1326, 1329 (9th Cir. 1984); Holden v. Canadian Consulate, 92 F.3d 918, 920 (9th Cir. 1996).

Plaintiffs allege that Defendant forged their signatures and a certification of their thumbprints on a corporate document pertaining to the Samho takeover. The parties disagree about the translation of the key document. We need not resolve the translation debate because, even under Defendant's version, the activity was commercial.

Documents assigning voting rights, or facilitating transfer, of shares in publicly held companies are routine forms of commercial activity. In addition, the act of forging a power of attorney or proxy statement is not an inherently public act that only a government could perform.

Defendant claims that the forgery was part of a larger scheme to nationalize Korean corporations. This argument relies on allegations made in Plaintiffs' state-court complaint but, as held above, the truth of those allegations cannot be judicially noticed. We take as true only the allegations of the complaint in the present action. See Saudi Arabia v. Nelson, 507 U.S. 349, 351 (1993) (stating this standard in an appeal of a motion to dismiss).

Even if Defendant's alleged forgery were part of a scheme to nationalize various companies, however, Defendant could not prevail because the FSIA

defines "commercial activity" to include not only a regular course of commercial conduct, but also "a particular commercial transaction or act." 28 U.S.C.

§ 1603(d). Defendant's forgery of the corporate document, not the entire scheme of nationalization, is the legally relevant particular commercial transaction or act.

"In determining whether the commercial activity exception applies, the courts focus only on those specific acts that form the basis of the suit." Joseph, 830 F.2d at 1023. Further, "[t]he entire case need not be based on the commercial activity of the defendant." Sun, 201 F.3d at 1109. Finally, the alleged purpose of the forgery is irrelevant because the nature and not the purpose of an act determines whether it is a commercial activity under the FSIA. 28 U.S.C. § 1603(d).

Defendant also argues that "certification by the Consul General's office has special significance under Korean law and gives rise to a presumption of authenticity." Even if Defendant is correct about the unique role of consular certification of thumbprints, the alleged forgery would have been complete even without it. Defendant performed all the acts that were necessary to manufacture a fraudulent power of attorney or proxy statement through means available to private actors.

C. Nexus of Defendant's Activity to the United States

Title 28 U.S.C. § 1605(a)(2) provides, as relevant here, that a foreign state is not immune if "the action is based upon a commercial activity carried on in the United States by the foreign state." The FSIA defines "commercial activity carried on in the United States by a foreign state" as "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e).

Defendant asserts that Plaintiffs' action is not "based upon" commercial activity in the United States unless all elements of Plaintiffs' claim occurred in the United States. We have rejected that interpretation on several occasions.

"According to Saudi Arabia [v. Nelson], an action is based on commercial activity in the United States if an element of the plaintiff's claim consists in conduct that occurred in commercial activity carried on in the United States." Sugimoto v. Exportadora de Sal, S.A. de C.V., 19 F.3d 1309, 1311 (9th Cir. 1994) (emphasis added); see also Sun, 201 F.3d at 1109 (quoting Sugimoto for the same principle).

Under California law, "conversion is the wrongful exercise of dominion over another's personal property in denial of or inconsistent with his rights in the property." Kasdan, Simonds, McIntyre, Epstein & Martin v. World Sav. & Loan Ass'n (In re Emery), 317 F.3d 1064, 1069 (9th Cir. 2003) (per curiam) (citing Weiss v. Marcus, 124 Cal. Rptr. 297, 303 (Ct. App. 1975)). The elements of

conversion under California law are: "(1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by wrongful act inconsistent with the property rights of the plaintiff; and (3) damages." Id. (citing Burlesci v. Petersen, 80 Cal. Rptr. 2d 704, 706 (Ct. App. 1998)).<sup>1</sup>

Defendant's forgery of the "power of attorney" satisfies the second element of Plaintiffs' conversion claim. The document purports to "wholly assign all rights" of Plaintiffs to engage in "[a]ll acts appurtenant to exercising of shareholders' rights." Further, the document purports to make the assurance that Plaintiffs "will not interpose any objections whatsoever in the future" to Daelim's "acceptance of the management authority of Samho." Even if the document is not a formal transfer of ownership of the shares of Samho stock, it is at least a transfer of all control and power over the shares. Thus, the alleged forgery and certification of the document constitute a wrongful exercise of dominion over Plaintiffs' personal property in a manner inconsistent with Plaintiffs' rights.

---

<sup>1</sup> A claim for conversion lies even if the allegedly converted property is intangible, such as corporate shares or bonds. Am. Bankers Mortgage Corp. v. Fed. Home Loan Mortgage Corp., 75 F.3d 1401, 1411 (9th Cir. 1996) (citing California case law).

The acts of which Plaintiffs complain occurred in Los Angeles and New York and, thus, had "substantial contact with the United States." 28 U.S.C. § 1603(e).

D. Conclusion

Plaintiffs' motion to strike is GRANTED.

Defendant's motion for judicial notice is GRANTED.

The district court's order denying Defendant's motion to dismiss is AFFIRMED.